83525-0

No. 36918-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL W. ROBINSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Christine A. Pomeroy, Judge
Cause No. 07-1-01283-8

BRIEF OF RESPONDENT

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2. Whether trial counsel was ineffective for failing to object to a second comment by the prosecutor regarding Robinson's failure to call alibi witnesses, and for failing to move again for a mistrial.

3. Whether there was sufficient evidence to support the jury finding that Robinson unlawfully possessed methamphetamine, and whether he was at the time armed with a firearm.

4. Whether Robinson's convictions for both first degree theft and theft of a firearm violate the prohibition against double jeopardy.

5. Whether Robinson waived a challenge to his offender score based on a claim that his convictions for theft in the first degree and theft of a firearm were improperly counted as separate offenses for purposes of calculating his offender score.

6. Whether Robinson's attorney was ineffective for failing to argue that theft in the first degree and theft of a firearm constituted same criminal conduct for purposes of calculating his offender score.

B. STATEMENT OF THE CASE.

The State accepts Robinson's statement of the procedural and substantive facts.

C. ARGUMENT.

1. The prosecutor's comments did not impermissibly imply that Robinson had a duty to call witnesses.

Robinson maintains that twice during his closing argument, in comments that the appellant quotes verbatim in his brief at pages 8 and 9, the prosecutor implied that he had a duty to present witnesses to corroborate the alibi about which he testified during trial.

Robinson testified in his own behalf. After denying any involvement in all of the charged crimes, or that he had made any of the incriminating statements that the police officers had testified that he made to them, he further testified that on the day of the burglary, he wasn't even in town. He told the jury that from sometime around 7:30 to 8:00 a.m. until 12:30 or 1:00 a.m. the following morning, he had been with his mother, two sisters, an aunt, and an ex-boyfriend of one of the sisters. They had spent the day at Lake Lawrence, at least until they were asked to leave, and then went to Ocean Shores for the remainder of the day and evening. [RP 270-272] None of these people were called at trial to corroborate his alibi. During closing, the prosecutor commented on that omission. Defense counsel objected, and his objection was sustained. [RP 334] Referring to Instruction 4 [CP 44], the prosecutor argued that the jury could consider the lack of evidence

in determining if a charge had been proven beyond a reasonable doubt. [RP 334-35] Trial counsel did not again object, but did move for a mistrial, or, in the alternative, a curative instruction, at the close of the State's argument and out of the presence of the jury. [RP 341-42]

Despite defense counsel's objection, and the court sustaining it, the prosecutor's remarks were not improper. A prosecutor may comment on the defendant's failure to call witnesses if it is clear that the defendant is able to produce such witnesses and the defendant testifies in such a way that he unequivocally implies that the witnesses could corroborate his theory of the case. State v. Contreras, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990). "Even where a defendant's constitutional right is involved, the Washington courts have ensured that the shield of the Fifth Amendment does not become a sword against reasonable prosecutorial argument." Id., at 474.

In Contreras, the defendant was on trial for second degree assault while armed with a deadly weapon. He took the stand and testified that at the time he had been with a female friend in another town. The female friend was not called to testify, and the prosecutor

both questioned him on cross-examination about this witness and commented in closing argument about his failure to call her. The Court of Appeals, Division I, held that:

> When a defendant advances a theory exculpating him, the theory is not immunized from attack. On the contrary, the evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence. The prosecutor may comment on the defendant's failure to call a witness so long as it is clear the defendant was able to produce the witness and the defendant's testimony unequivocally implies the uncalled witness's ability to corroborate his theory of the case.

Id., at 476.

Similarly, in State v. Barrow, 60 Wn. App. 869, 809 P.2d 209 (1991), the defendant was charged with two violations of the Uniform Controlled Substances Act. He testified at trial that a pipe containing cocaine residue, which was found on his person, actually belonged to his brother and he had taken it without knowing it contained cocaine. He did not call his brother to testify. During closing, the prosecutor questioned that testimony and wondered where the brother might be. Division I of this court, citing to Contreras, said that "a prosecutor can question a defendant's failure to provide corroborative evidence if the defendant testified

about an exculpatory theory that could have been corroborated by an available witness." Barrow, *supra*, at 872.

The Supreme Court, in State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991), cited both Contreras and Barrow with approval, and held that the "missing witness" or "empty chair" rule applied to the defense as well as the State.

> Under the "missing witness" or "empty chair" doctrine, it has become a well established rule that where evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and . . . he fails to do so,-- the jury may draw an inference that it would be unfavorable to him.

Blair, *supra*, at 485-86, citations omitted. The court did, however, set several limitations on the ability of the State to comment on the defendant's failure to call particular witnesses. The circumstances must be such that, "as a matter of reasonable probability", the defendant would not fail to call the witness unless his or her testimony would be damaging to his defense, and it would be natural for him to call that witness if the anticipated testimony would be favorable. Id., at 488. The missing witness rule does not apply if the witness is unimportant or cumulative. Id., at 489. If the failure to call the witness is explainable, the witness is not competent to

testify or some privilege applies, the witness would incriminate himself by testifying favorably to the defendant, or the witness is equally available to all parties, the inference does not apply. Id, at 489-90.

The prosecutor's comments cannot touch on the defendant's right to remain silent. A defendant who testifies waives that right. Id., at 491. The Blair court further noted that the trial court there properly instructed the jury that "counsel's remarks are not evidence . . . and that the State has the burden of proof and the defendant is presumed innocent. . . ." "The missing witness inference, if permissible in light of the limitations discussed in this opinion, is not impermissible simply because credibility is a central issue." Id., at 492.

Robinson's case fits within all of the limitations required by the Blair court. He testified that four members of his family and a sister's former boyfriend were with him all day, and it would be natural for him to produce them to corroborate his alibi. While if they all testified some of the testimony would be cumulative, Robinson did not call any of them. No explanation was offered, satisfactory or not, for their absence. There is no indication that

they were incompetent or any privilege would apply. It is not apparent that they would be incriminating themselves by admitting that Robinson had been with them in public places. These persons were not equally available to the State. There is no indication that the State knew the names or address of these people, or, for that matter, that the prosecutor had ever heard of this alibi before Robinson took the witness stand. They are members of Robinson's family, and presumably would be anxious to help him avoid being convicted of a crime. Finally, the trial court instructed the jury that the State bore the burden of proof, the State's remarks were not evidence, and that the defendant is presumed innocent. [CP 40, 44; RP 334, 344]

The prosecutor's remarks during his closing argument [RP 334-335] were permissible argument, and it was unnecessary for the court to sustain the defense objection to them. The court more than adequately instructed the jury as required by the Blair court, and thus the motion for mistrial was properly denied.

2. Defense counsel was not ineffective for failing to immediately object to the prosecutor's second comment or to immediately move for a mistrial.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when but for the deficient performance, the outcome would have been different. In the Matter of the Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App.

916, 923, 729 P.2d 56 (1989). Moreover, counsel's failure to offer a frivolous objection will not support a finding of ineffective assistance. State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 694, *review denied*, 84 Wn. 2d 1012 (1974).

As discussed in the previous section, trial counsel was incorrect in objecting to the remarks of the prosecutor at all, and therefore it cannot be ineffective assistance for him to fail to object to the second remarks immediately. Even if he had been correct, it was good tactics to make his motion for mistrial outside the presence of the jury because the defense would want to avoid emphasizing to them that Robinson had not called any alibi witnesses. Robinson has not shown any prejudice resulting from the omissions of which he complains, nor that his counsel's performance fell below the standard set by Strickland.

3. There was sufficient evidence produced at trial to establish that Robinson was an accomplice to Daniel Smith, that he constructively possessed methamphetamine, and that he was armed with a firearm at the time the crime was committed.

a. Sufficiency of the evidence.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier

of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

> "[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (Cite omitted.) This inquiry does not require a reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt. "Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt.* (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, *supra*, at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

b. There was sufficient evidence produced at trial to allow a rational trier of fact to find that Robinson was an accomplice to Daniel Smith in the possession of methamphetamine.

"Mere presence at the scene of a crime, even if coupled with assent to it, is not sufficient to prove complicity. The State must prove that the defendant was ready to assist in the crime." State v. Luna, 71 Wn. App. 755, 759, 862 P.2d 620 (1993) (citing to State v. Rotunno, 95 Wn.2d 931, 933, 631 P.2d 951 (1981) and In re Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979).

The jury in this case heard evidence that Robinson told Detective Clevenger that he had been with Smith the previous day and described accurately both the method by which the burglary

was accomplished and the property that was taken. [RP 152-155] He gave similar information to Detective Anderson, additionally telling her he had loaded items from the victim residence into a vehicle. [RP 225-26] The following day Robinson was with Smith in a vehicle containing some of the property stolen in the burglary. The jury thus had a picture of a partnership between Robinson and Smith in committing crimes that, added to the evidence discussed below, permitted an inference that whatever crimes the were occurring, were the result of the two acting together.

c. There was sufficient evidence to allow a rational trier of fact to find that Robinson was in constructive possession of the methamphetamine in the trunk of the car.

> [C]lose proximity alone is not enough to establish constructive possession; other facts must enable the trier of fact to infer dominion and control. . . But the ability to reduce an object to actual possession is an aspect of dominion and control. . . No single factor, however, is dispositive in determining dominion and control . . . The totality of the circumstances must be considered.

State v. Turner, 103 Wn. App. 515, 521, 13 P.3d 234 (2000) (cites omitted).

Robinson argues that because he was not the sole occupant of the Acura, he did not have dominion and control over the vehicle

and was not responsible for what was in the car. This overlooks the fact that he admitted that items found in the car, such as a cell phone, the pants, a hat, and a note, did belong to him. [RP 129, 138] In any event, constructive possession does not require exclusive control. Turner, *supra*, at 522. The evidence that the jury considered included testimony that Robinson had been a partner in a burglary the day before and his personal property was scattered throughout the car—the hat (in which was a note addressed to him from his girlfriend) was in the glove compartment, the pants and cell phone in the back seat. He told Detective Clevenger he had handled the gun, although didn't fire it [RP 156], he knew the meth lab was in the trunk and told the detective about it before it was otherwise discovered. [RP 157-58] The jury was entitled to consider that a casual passenger in a vehicle normally doesn't put his property in the glove compartment nor know what is in the trunk of that vehicle.

Besides the meth lab, the trunk of the car contained paper printed with U. S. currency. [RP 191-92] In the pocket of the pants in the car, which Robinson first told Detective Clevenger belonged to him [RP 129] and then denied owning, [RP 261] was counterfeit

currency. [RP 149-50] It is a reasonable inference that if Robinson was connected to evidence of counterfeiting in the trunk, he was connected to evidence of methamphetamine in the trunk, particularly since there was a meth pipe in the same pair of pants. Robinson, although he denied ownership of the pipe, [RP 127], admitted that he used meth. [RP 265] These pants, which would have fit Robinson but not Smith, [RP 127] also contained a cell phone that Robinson not only claimed to own, but when Detective Clevenger dialed the number Robinson gave for his phone, that cell phone rang. [RP 129]

The only way Robinson could have had greater control of the car was if he were driving. Neither he nor Smith owned the Acura. [RP 119] Considering the totality of the circumstances, the jury could reasonably infer that Robinson and Smith jointly controlled the vehicle.

d. There was sufficient evidence that a rational trier of fact could find that Robinson was armed with a firearm for purposes of the firearm enhancement.

"Whether a person is armed is a mixed question of law and fact." State v. Mills, 80 Wn. App. 231, 234-35, 907 P.2d 316 (1995). Whether the facts are sufficient to prove, as a matter of law, that

the defendant was armed is a question of law that is reviewed de novo. State v. Schelin, 147 Wn.2d 562, 566, 55 P.3d 632 (2002).

In proving that a defendant was armed at the time a crime was committed, the State must prove more than mere proximity or constructive possession. The weapon must be easily accessible and readily available, but it is not necessary that the defendant actually have the gun in hand or on his person. State v. Gurske, 155 Wn.2d 134, 138, 118 P.3d 333 (2005). "This requirement means that where the weapon is not actually used in the commission of the crime, it must be there to be used." Id.

"[T]here must be a nexus between the weapon and the defendant and between the weapon and the crime." Schelin, *supra*, at 568. "One should examine the nature of the crime, the type of weapon, and the circumstances under which the weapon is found (e.g., whether in the open, in a locked or unlocked container, in a closet on a shelf, or in a drawer)." Schelin, *supra*, at 570. The weapons enhancement applies to accomplices of a person armed with a weapon. Schelin, *supra*, at 572.

Robinson acknowledges that courts have found the required nexus between the weapon and the crime when the crime is

possession of drugs. His argument is that the weapon was not readily accessible because it was in a closed box located directly behind the passenger seat. He cites to State v. Gurske, *supra*, a case in which the Supreme Court found that a gun contained in a backpack located behind the driver's seat was not readily accessible because there was insufficient evidence introduced at trial to show that Gurske could have removed the gun without getting out of the vehicle. Here, however, the gun was in a cell phone box and directly behind the passenger seat with a fully loaded magazine inserted. [RP 41] A cell phone box is a much smaller container than a backpack, and it is a reasonable inference that either Robinson or Smith could easily have reached inside it and retrieved the gun. It would not be difficult to move a cloth covering the gun, which presumably they would want to keep out of sight.

The nexus between the gun and the crime is highlighted by the specific items from the burglary that were still in the car the next day. The victims and the investigating officer testified that among the items taken in the burglary were the gun and its accessories, an iPod and an iPod alarm clock, a camera, a small safe, a second

alarm clock, a shredder, a cell phone, some keys, checkbooks, and a shredder. [RP 11-15, 71-77, 105] In the car at the time Robinson was arrested were some checkbooks, at least one of the keys, the gun and its accessories, and the cell phone. [RP 41-45, 134-135] These are items they could use in their various criminal pursuits. The iPods, camera, safe, shredder, and other items were not in the car. (There was a web camera located in the car [RP 140], but the stolen cameras were digital ones. [RP 72])They carried with them the useful "tools", in other words. One of the victim's checks had been forged and cashed. [RP 91] The things that weren't useful to them weren't in the car. The gun was another "tool" which they used in operating their "business". There was no point in having it in the passenger area of the car, rather than the trunk, unless they wanted it to be handy for use in protecting their drug enterprise. Even though Robinson told an entirely different story on the witness stand, he admitted to the Washington State Patrol detective that he not only knew it was there but had handled it. Credibility determinations are for the jury to make, and their choice to believe the detective over the defendant is not subject to review.

4. The legislature has made it clear that theft of a firearm and first degree theft are two separate offenses, and convictions for both do not violate double jeopardy.

Robinson was convicted of both first degree theft and theft of a firearm for items taken during the same burglary. He was charged with theft of a firearm under 9A.56.300(1) [CP 28]:

> Theft of a firearm. (1) A person is guilty of theft of a firearm if he or she commits a theft of any firearm.
>
> (2) This section applies regardless of the value of the firearm taken in the theft.
>
> (3) Each firearm taken in the theft under this section is a separate offense.
>
> (4) The definition of "theft" and the defense allowed against the prosecution for theft under RCW 9A.56.020 shall apply to the crime of theft of a firearm.
>
> (5) As used in this section, "firearm" means any firearm as defined in RCW 9.41.010.
>
> (6) Theft of a firearm is a class B felony.

Robinson was also charged with theft in the first degree under RCW 9A.56.030(1)(a) [CP 29]:

> Theft in the first degree—Other than firearm or motor vehicle. (1) A person is guilty of theft in the first degree if he or she commits theft of:
>
> (a) Property or services which exceed(s) one thousand five hundred dollars in value *other than a firearm as defined in RCW 9.41.010*;
>
> (b) Property of any value, *other than a firearm as defined in RCW 9.41.010* or a motor vehicle, taken from the person of another; or

> (c) A search and rescue dog, as defined in RCW 9.91.175, while the search and rescue dog is on duty.
>
> (2) Theft in the first degree is a class B felony.

(Emphasis added.)

Robinson argues that his convictions for both of these offenses violates double jeopardy because he is being punished twice for the same offense. However:

> "To impose more than one punishment for conduct that violates more than one criminal statute is not necessarily a violation of double jeopardy. The fundamental question for purposes of double jeopardy analysis is whether the legislature intended that result."

State v. Cole, 117 Wn. App. 870, 875, 73 P.3d 411 (2003) (citing to State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995)). If the relevant statutes do not make it clear whether the legislature intended one or two convictions, the court then turns to rules of statutory construction. Id. In this case, the language of the statutes themselves do answer the question, and the answer is that the legislature intended separate punishments for these two crimes.

Robinson argues that because multiple items were taken at the same time, he can only be charged with first degree theft. However, the statues make it clear that he *cannot* be charged with

taking the firearm under the 9A.56.030, because that specifically excludes firearms, and he *cannot* be charged under RCW 9A.56.300 with stealing the other items taken in the burglary because that statute applies specifically to firearms. Because the legislature made taking $1500 or more worth of property other than firearms a mutually exclusive crime from theft of a firearm, it is obvious that the intent is for the crimes to be punished separately. It makes no sense to argue that the legislature intended that if a defendant stole a firearm at the same time as he stole other property worth $1500 or more, he would get a free pass on one or the other. (The record shows that the value of the property other than the firearm that was taken in the burglary totaled well over $1500. [RP 74-77]) This conclusion is reinforced by 9A.56.300(3), above, which provides that where more than one firearm is taken in a theft, each firearm is a separate offense. If taking multiple guns would not constitute one offense, it makes it even less likely that taking a gun plus other items would constitute a single offense.

Further evidence for this legislative intent is found in the historical and statutory notes following RCW 9.94A.510 (recodified

from RCW 9.94A.310 by ch. 10, § 6, LAWS OF 2001). In part, these notes read:

> (2) By increasing the penalties for carrying and using deadly weapons by criminals and closing loopholes involving armed criminals, the people intend to:
> . . .. . .
>
> (c) Distinguish between the gun predators and criminals carrying other deadly weapons and provide greatly increased penalties for gun predators and for those offenders committing crimes to acquire firearms.

Also instructive is RCW 9.41.040(6), part of the Hard Time for Armed Crime Act, ch. 129, § 10, LAWS OF 1995:

> Nothing in chapter 129, Laws of 1995 shall ever be construed or interpreted as preventing an offender from being charged and subsequently convicted for the separate felony crimes of theft of a firearm or possession of a stolen firearm, or both, in addition to being charged and subsequently convicted under this section for unlawful possession of a firearm in the first or second degree. Notwithstanding any other law, if the offender is convicted under this section for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, then the offender shall serve consecutive sentences for each of the felony crimes of conviction listed in this subsection.

The legislature could not be more explicit that crimes related to firearms are to be treated very seriously, and that firearms are different from any other kind of property.

Robinson maintains that when there are multiple convictions under the same statute, the correct analysis is to determine the appropriate unit of prosecution. While that is true, it is irrelevant to his case, because he was convicted under different statutes. He cites to State v. McReynolds, 117 Wn. App. 309, 71 P.3d 663 (2003) for the holding that when a defendant possesses a number of different stolen items, it is one count of possession of stolen property regardless of the number of items or their individual values. However, one of the stolen items in McReynolds was a firearm, and the court specifically noted that possessing a stolen firearm is a different crime, which McReynolds did not dispute. Id., at 355, fn 7.

Whether or not the two thefts occurred during the same course of conduct is similarly irrelevant. The legislature has determined that theft of a firearm is a crime separately punished from other crimes no matter how many were committed in one course of conduct.

Robinson argues that his case meets the "same elements" test, in that both of the statutes under which he was charged have the same intent element. However, since one statute excludes firearms and the other excludes everything else, some of the elements are not the same. Not only can a person commit one crime without committing the other, it is not possible for him to commit one while committing the other. The two offenses are not the same both in law and in fact, and there is no double jeopardy. State v. Frohs, 83 Wn. App. 803, 813, 924 P.2d 384 (1996).

The merger doctrine is another of the means used to determine whether the legislature authorized multiple punishments in a particular case. This doctrine applies when the legislature has clearly indicated that in order to prove a particular degree of a crime, the State must prove not only that the defendant committed that crime, but also committed an additional act which is itself defined as a crime elsewhere in the criminal code. In that instance, the two crimes may merge. State v. Freeman, 153 Wn.2d 765, 777-78, 108 P.3d 753 (2005). *See also* State v. Vladovic, 99 Wn.2d 413, 662 P.2d 853 (1983). Here that circumstance does not exist and therefore merger is not applicable.

The legislature has made it clear that crimes involving firearms will be punished separately. There is no double jeopardy violation.

5. Robinson waived the same criminal conduct issue by not raising it in the court below.

Issues not raised at trial may not be raised for the first time on appeal. RAP 2.5(a). Although generally a defendant cannot waive a challenge to a miscalculated offender score, there can be a waiver where "the alleged error involves an agreement to facts, later disputed, or where alleged error involves a matter of trial court discretion." In re Goodwin, 136 Wn.2d 861, 874, 50 P.3d 618 (2002) "[A]pplication of the same criminal conduct statute involves both factual determinations and the exercise of discretion." State v. Nitsch, 100 Wn. App. 512, 523, 997 P.2d 1000 (2000) *review denied*, 141 Wn.2d 1030, 11 P.3d 827 (2000). The Sentencing Reform Act (SRA) of 1981 allows the sentencing court to rely in information that is admitted or acknowledged at the time of sentencing. RCW 9.94A.530(2). A defendant waived the same criminal conduct issue by failing to raise it below and admitting or

acknowledging the offender score calculation during sentencing. Nitsch, *supra*, at 519.

Here, Robinson specifically agreed with the standard range submitted by the State, which he would have done only if he also agreed with the calculation of the offender score. In Nitsch, the defendant agreed with the offender score in his presentence report, and the court held this was an implicit admission that his crimes did not constitute the same criminal conduct. By contrast, in State v. Anderson, 92 Wn. App. 54, 960 P.2d 975 (1998), *review denied*, 137 Wn.2d 1016, 978 P.2d 1099 (1999), the defendant was permitted to argue for the first time on appeal that his crimes constituted the same criminal conduct, because in that case he had not affirmatively acknowledged his offender score at sentencing. By agreeing to his offender score as found by the sentencing court, Robinson has waived his right to raise it on appeal.

6. Defense counsel was not ineffective for failing to raise the issue of same criminal conduct.

A defendant must overcome the presumption of effective representation and demonstrate (1) that his lawyer's performance was so deficient that he was deprived of "counsel" for Sixth

Amendment purposes and (2) that there is a reasonable probability that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997).

Robinson has failed to establish either prong of the ineffective-assistance test. Merely asserting that "the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have failed to properly make the argument . . ." [appellant's brief at page 30] does not satisfy his burden. He has further failed to establish prejudice in that he has not shown a likelihood that, if he had raised the issue below, that the court, taking into consideration that crimes involving firearms are treated more harshly by the legislature, would not have exercised its discretion to find that the two crimes did not constitute the same criminal conduct.

Defense counsel in this case recommended the bottom of the standard range and offered the court an argument for imposing that sentence. [10/30/07 RP 10-12] Robinson has failed to prove either prong of the Strickland test.

D. CONCLUSION.

The prosecutor did not impermissibly imply that Robinson had a duty to present evidence, and therefore it was not error for the court to deny his motion for a mistrial, nor was his counsel ineffective for not objecting immediately to a second comment. There was sufficient evidence presented to support Robinson's conviction for unlawful possession of methamphetamine and that he was armed with a firearm for purposes of the sentencing enhancement. His convictions for first degree theft and theft of a firearm are, by the language of the statutes, punishable as separate offenses. By affirmatively agreeing to his standard range he thereby agreed to the calculation of his offender score and has waived his right to appeal that issue. He has not established that his counsel was ineffective.

The State respectfully asks this court to affirm all of Robinson's convictions and find that he waived the challenge to his offender score.

Respectfully submitted this 13th day of August, 2008.

Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, No. 36918-4-II, on all parties or their counsel of record on the date below as follows:

☒ US Mail Postage Prepaid

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_____

TO:

THOMAS E. DOYLE
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 13th day of August, 2008, at Olympia, Washington.

_____
TONYA MAIAVA